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SUPREME COURT, U. S.

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No. 557

Supreme Court of the United States

October Term, 1965

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—and—

ANTHONY ALBANESE,

Co-Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October Term, 1965

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N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, International Terminal Operating Co., Inc., prays that a writ of certiorari issue to review the revised decision and judgment of the United States Court of Appeals for the Second Circuit, entered June 15, 1965, and the denial of a petition for a rehearing and rehearing *in banc,* filed June 15, 1965 with the revised opinion, which reverses a final judgment entered in accordance with a general jury verdict in the United States District Court for the Southern District of New York on April 17, 1964 dismissing Respondent's third-party complaint against Petitioner.

Citations to Opinions Below

The District Court (Hon. Irving Ben Cooper) delivered no written opinion, but its judgment entered on a jury verdict is printed as Appendix A hereto.

The initial opinion of the Court of Appeals of April 9, 1965 is unreported, and is printed as Appendix B hereto.

The revised opinion of the Court of Appeals filed June 15, 1965 is reported officially at 346 F. 2d 481, and is printed as Appendix C hereto. The judgment of the Court of Appeals entered June 15, 1965 is printed as Appendix D hereto.

Jurisdiction

On April 9, 1965, judgment was initially entered in the United States Court of Appeals. A timely petition for rehearing and rehearing *in banc* was filed on April 22, 1965. Such petition was denied and a revised opinion and judgment were entered on June 15, 1965 (Tr. 91a-102a).

This petition for a writ of certiorari is filed within 90 days after the denial of the petition for rehearing and the entry of judgment on June 15, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

(1) In reversing a jury verdict which exonerated Petitioner from Respondent's claim for indemnity, did the Court of Appeals deprive Petitioner of its constitutionally guaranteed rights of due process and trial by jury by predicating reversal solely on an alleged erroneous charge which the record discloses was not given?

(2) Where a stevedore complained to a ship's officer as soon as a dangerous condition was known or should reasonably have been known, and where the ship's officer directed the stevedore to continue working under the dangerous condition with the added assurance that he would promptly and entirely eliminate the dangerous condition, and where the stevedore complies, then

(a) can the stevedore be said to have breached its implied warranty of workmanlike service to the shipowner as it is performing only as specifically requested by the shipowner; and

(b) is not the shipowner guilty of "conduct on its part sufficient to preclude recovery" of indemnity in accordance with the opinion of this Honorable Court in *Weyerhaeuser* v. *Nacirema Operating Co.*, 355 U. S. 563, 567?

(3) Precisely what does this Court mean by "conduct on its part sufficient to preclude recovery," and what yardsticks are to be applied by inferior courts in resolving that issue?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMEND. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statement of the Case

The instant action presents the familiar tripartite situation of a longshoreman suing a shipowner for personal injuries sustained aboard ship, with the shipowner in turn impleading the plaintiff's stevedore employer seeking full indemnity. Federal jurisdiction is predicated upon the diversity of citizenship between the plaintiff-longshoreman (New Jersey) and the defendant-shipowner (The Netherlands) with the amount in issue exceeding $10,000.00 exclusive of interest and costs.

On February 25, 1961, Petitioner was engaged in loading steel sheets and tinplate into the #2 hold of Respondent's vessel, the M. S. Schiedyk. One of the longshoremen employed by Petitioner in performing that work was the co-petitioner and plaintiff herein, Anthony Albanese. As is perfectly normal and customary in this type of stevedoring operation, small gasoline powered vehicles known as hi-los were used by the longshoremen to help move and manipulate the heavy cargo being stowed. Naturally, these vehicles emitted some carbon monoxide in their exhaust fumes as do all such motor vehicles.

The vessel was equipped with a Cargocaire ventilating system with an air moving and changing capacity of 6000 cubic feet per minute. Although this system, under the Respondent-shipowner's exclusive possession and control, was not turned on at the beginning of the loading operation, there was undisputed testimony that the natural ventilation of the hatch and cowl openings usually suffice to remove whatever exhaust fumes are emitted by hi-los (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 30a-38a). As carbon monoxide is lighter than air, the adequacy of natural ventilation in many instances is not at all surprising.

There was a unanimity of testimony from both the longshoremen and Respondent-shipowner's personnel that up until at least 10:45 A.M. the working conditions in the hatch were normal, the atmosphere in the hatch was clean with no hovering clouds of smoke or fumes, and the work was proceeding steadily and peacefully, without complaint, difficulty or incident (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 1a, 13a, 15a, 19a-20a, 24a, 38a-40a).

At approximately 10:45 A.M. a second gang of longshoremen started to work on another deck in the same hatch, using a second hi-lo. After the second hi-lo was in operation for approximately 20 minutes, the longshoremen began to complain of smoke and fumes in the hold and requested a ship's officer to turn on the vessel's Cargocaire ventilating system (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 3a-6a, and 8a-12a). The vessel's mate assured both the longshoremen's hatch boss and the gangwayman that he would turn on the vessel's Cargocaire system, and he ordered them to continue working (*ibid.*). In reliance upon such assurance, and in re-

sponse to such order, the longshoremen did continue working.

After continuing at work for a few minutes, the hatch boss realized that the ship's officer had not turned on the Cargocaire system as promised, and he again climbed out of the hold to find such officer and ascertain what was happening. Unable to find the officer after a few moments of search, the hatch boss returned to the hold and ordered all the longshoremen to quit work and come up. The plaintiff was overcome in the process of leaving the hold (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 9a-12a).

Indeed, although the Respondent-shipowner conceded on page 5 of its brief on appeal:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact.",

both the initial and revised opinion of the Court of Appeals state merely:

> "There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on."

The Trial Judge's charge to the jury on the issues involved in Respondent-shipowner's claim for indemnity against your Petitioner occupies slightly less than four printed pages (Vol. III, 81a-84a). Approximately three and one-half of those pages advised the jury of your Petitioner's obligation to perform its services in a workman-

like manner and of what would constitute a breach of that obligation. Then, in two relative short paragraphs, the Trial Judge disposes of the issue of indemnity defeating conduct on the part of the shipowner as follows:

> "But equally important is this proposition of law; that if on the other hand you find that the stevedore company acted with reasonable promptness to protect its men upon learning of the danger and was hindered by the ship's officers, then you must find that the stevedore did not breach its warranty.
>
> *Should you find that complaints were made to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and if you find that the ship's officer directed or requested the longshoremen to continue working under these conditions with the added assurance that the dangerous condition would be promptly and entirely eliminated, then you may find that the stevedore acted to protect its men; and, in that event, the shipowner is not entitled to recover indemnity.* (Italics added.)

Obviously, as is conceded by the Respondent-shipowner, the jury believed the testimony that the hatch boss and gangwayman timely complained to a ship's officer about the atmosphere in the hold; were assured by the ship's officer that he would rectify the situation by turning on the vessel's Cargocaire ventilating system, were directed by the ship's officer to continue at work, and following such directions and relying upon such assurances did in fact continue at work for a few more moments until it appeared that the ship's officer had not turned on the ventilating system as promised.

The only error, assigned by the Court of Appeals in both the initial and revised opinions for reversing this jury verdict and remanding the claim over for a new trial, was:

> "The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error."

However, no such charge was given. And, under the charge actually given, as reflected by the record and above quoted, the jury had to find far more than a mere request on the part of the Stevedore to the Shipowner to turn on the blowers in order to exonerate or absolve the Stevedore herein. Under the charge actually given, in order to absolve or exonerate the Stevedore the jury was required to find (1) that the Stevedore made complaints to a ship's officer as soon as it knew or should have reasonably known of the dangerous condition, (2) that the ship's officer directed or requested the longshoremen to continue working under the dangerous conditions complained of, and (3) that the ship's officer gave assurance that he would rectify the condition. And the jury was instructed that upon such fact findings, it may (permissively, not mandatorily) find the shipowner not entitled to recover indemnity.

This difference between the charge actually given, as reflected by the record, and the erroneous charge which the Court of Appeals felt warranted a reversal but which the record discloses was not in fact given, was pointed out to the Court of Appeals in your Petitioner's petition for rehearing and rehearing *in banc*. This was all to no avail as the Court's of Appeals revised opinion was verbatim identical to its initial opinion insofar as the claim for indemnity was concerned.

In reversing a jury verdict on the basis of an erroneous charge which the record discloses never to have been given,

and in ignoring the actual record, the most respected Court of Appeals committed grave errors far transcending in importance this individual case and worthy of consideration by this Honorable Court.

Reasons for Granting the Writ

1. *The importance of the Questions Presented*

This Court has had occasion to classify "fair play" as the very essence of due process, *Galvin* v. *Press,* 347 U. S. 522, 530 (1954); and has held a misreading of the record, whether by carelessness or design, to be inconsistent with due process of law, *Townsend* v. *Burke,* 334 U. S. 736, 740-1 (1948). It is the very antithesis of fair play for an appellate court to reverse a jury verdict for an alleged erroneous charge which the record discloses never to have been given. Appellate importation of error to the record is at once a violation of our fundamental concepts of justice.

Petitioner's constitutionally guaranteed right of due process has thus been violated by the reversal of the favorable jury verdict following a lengthy trial on the merits on the basis of an alleged error which can, at best, only be due to a misreading of the record.

Further, the factual issues between Petitioner and Respondent having once been litigated at length before a jury, the reversal of such jury verdict on the basis of a non-existent error and a remand of the same factual issues for another trial impinges upon Petitioner's right to trial by jury. The action of the Court of Appeals in requiring another court to re-examine those same factual issues in this case violates the protection guaranteed your Petitioner by the Seventh Amendment to the United States Constitution.

Important as such deprivations of constitutionally guaranteed rights are in and of themselves, they are of even greater importance by reason of the fact that they occur in the sensitive field of maritime indemnity and were committed by the Court of Appeals of the Second Circuit. Territorially embracing the largest port in the country, the decisions of the Court of Appeals for the Second Circuit in this field are given somewhat more than usual weight and frequently set a nationwide pattern. When that court, in its leapfrogging zeal to implement a mistaken conception of law, transgresses civil rights, a long step has been taken to make stevedores legal pariahs-outcasts at law. Such action should not go unheeded or unchecked by this Honorable Court.

The indemnity action of the Respondent-shipowner was successfully defended by the Petitioner-stevedore on the basis that (a) it was acting only as expressely directed by Respondent-shipowner and hence could not be guilty of a breach of warranty, and (b) the Respondent-shipowner's directions to continue at work with assurances that the dangerous condition would be completely and entirely eliminated constituted "conduct sufficient to preclude recovery" of indemnity. The jury obviously believed the facts to be as contended by your Petitioner, and Respondent has conceded that such facts must be accepted as true for the purposes of the appeal. Accordingly, the decision herein of the Court of Appeals can only be construed as notice to the stevedoring industry that they will be responsible at law to their customers (shipowners) for doing exactly what their customers direct them to do. Obviously then, the stevedore is being urged by the Court of Appeals to render performance contrary to the manner directed by the shipowner. Such action by a stevedore, or by any party to its contractual privy, subjects that party to a lawsuit for breach of contract and loss of a customer.

Liable if it does, and liable if it doesn't, the stevedore is being judicially located between Scylla and Charybidis. Research discloses no other industry which can be held liable for breach of warranty only for doing precisely what the warrantee orders. Indeed, the general common law appears to be quite to the contrary. See, e.g., *Corbin on Contracts,* Sections 571, 947 and 1264; *Restatement of Contracts,* Sections 295 and 315; *New York Uniform Commercial Code,* Section 2-316.

The importance to the stevedoring industry of obtaining a definitive opinion from this Honorable Court of the extent of the implied warranty of workmanlike service, and the yardsticks to be applied in determining what conduct precludes indemnity, can not be minimized. Contractual sanity and the disposition of many pending cases in this field, with many more to come, call for this Honorable Court's consideration of the issues here involved.

2. *The instant decision is in conflict with holdings and principles enunciated by this Court*

The question of whether a stevedore rendered substandard performance, and the question of whether a shipowner's conduct precludes indemnity, have been held by this Court to be questions of fact for determination by the jury, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958). Indeed, "the federal policy favoring jury decisions of disputed fact questions" stems from "the influence—if not the command—of the Seventh Amendment," *Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U. S. 525, 537-8 (1958).

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U. S. 355 (1962), this Court clearly indicated that an appellate search for the one possible view of a case that

would void a jury verdict is improper. In improperly straining itself to search for the one view of the case which would void the verdict, even to the extent of importing error where the record shows none to have existed, the Court of Appeals has taken an approach completely contrary to the principles enunciated by this Court and, in addition to being violative of the Seventh Amendment, is destructive of our entire jurisprudential system.

Indeed, the burning desire of the Court of Appeals for the Second Circuit to usurp for itself the function of the jury and to impose liability upon marine contractors has now culminated in its affirmance of a directed verdict on the very issues which this Court stated were for jury determination, see *Mortensen v. A/S Glittre*, (2nd Cir., decided July 8, 1965, Docket #28871). In that case, it was decided that the plaintiff's admitted prior knowledge of an oil slick on deck constituted, *as a matter of law*, a breach of his employer's implied warranty of workmanlike service; and, *again as a matter of law*, that the creation of that dangerous condition by the shipowner did not constitute indemnity defeating conduct.

Contrast *Mortensen, supra*, with this Court's approach in *Weyerhaueser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958), where notwithstanding that the stevedore *created* the dangerous condition, this Court ruled that the issues of breach of warranty and indemnity defeating conduct were for the jury to resolve as *issues of fact*.

The supplanting of a jury by an appellate court is an invidious legal cancer which must be treated by this Court before it is completely metastasized.

3. *The instant decision by the Court of Appeals for the Second Circuit is in conflict with decisions of other Courts of Appeals on the same matter, and is, indeed, in conflict with its own earlier decision*

Bearing in mind that the Respondent-shipowner conceded on page 5 of its brief on appeal that:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact.",

let us examine the results obtained in other Circuits under similar established facts.

The case of *Moore-McCormack Lines Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663 (4 Cir. 1962), is most apposite. In that case, two ship's ceilers or carpenters were overcome by noxious fumes from earlier cargo fumigation. When the ship ceilers started work they noticed a strong, unpleasant and peculiar odor emanating from the hold. They called the attention of the ship's officer to this odor and he assured them that it was not harmful and that it was all right for them to continue work. They entered the hold and thereafter became ill from the effects of hydrogen cyanide gas.

The jury verdict denied the shipowner indemnity from the plaintiff's employer. As here, the shipowner appealed from the Court's refusal to grant its motion for a directed verdict as against the ship ceiling company and argued in substance that having suspected that the conditions were dangerous the ship ceiling company rendered itself liable to indemnity when it sent its men into a condition of danger. The Court, however, found that such argument

took into account only a portion of the relevant facts and stated (p. 667 of 311 F. 2d):

> "It did not compel a directed verdict in favor of the shipowner. In summation, there was evidence from which a jury might find that the employees of the ship ceiling company were not negligent in attempting to do their work after receiving assurances from an officer of the ship that the condition was not dangerous."

And, on page 668 of 311 F. 2d, the Court further stated:

> *"We think that there was substantial evidence to support the ruling of the Judge and all the findings of the jury in this respect and that the facts of the case warrant the findings that the performance of the ship, in the language of the Supreme Court in the Weyerhaeuser case, 355 U. S. 563, 567, 78 S. Ct. 438, 440, amounted to 'conduct on its part sufficient to preclude recovery.'"* (Italics added.)

Similarly, the Court of Appeals for the Third Circuit has stated:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective, after receiving a categorical assurance from the shipowner's crew that it was 'O.K.' The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury." *Hodgson* v. *Lloyd Brasileiro Patrimonis Nacional*, 294 F. 2d 32 (3rd Cir. 1961).

And, in *Torres Cruz* v. *Hudson Steamship Company*, 206 F. Supp. 216 (Puerto Rico), aff'd sub. nom. *Hudson Steamship Company* v. *Colon*, 314 F. 2d 44 (1st Cir. 1963); and *United States* v. *Harrison*, 245 F. 2d 911 (9th Cir. 1957), shipowner's directions to the stevedore to continue working under dangerous conditions, and shipowner's assurances of safety, were considered ample reason for denial of indemnity.

Thus, the instant decision by the Court of Appeals for the Second Circuit, based upon conceded facts, is directly in conflict with decisions from the First, Third, Fourth, and Ninth Circuits as above indicated.

Indeed, the instant decision appears to conflict with an earlier decision of the Second Circuit itself in *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857 (S. D. N. Y. 1963) aff'd 328 F. 2d 40 (2nd Cir. 1964). For, Judge Weinfeld there indicated (page 862 of 215 F. Supp.) that to avoid liability the stevedore should have insisted that the ship's officer turn on the ventilating equipment, or else should have ordered the men out of the hold. That was precisely what the stevedore did in the instant case, and the jury so found. Yet, the Court of Appeals reversed the verdict.

By reason of these inter and intra circuit conflicts, the instant case warrants review by this Court to definitively resolve these issues.

4. *The Courts themselves seek clarification of what this Court meant by "conduct on its part sufficient to preclude recovery" of indemnity in* Weyerhaeuser v. Nacirema Operating Co., *355 U. S. 563*

In *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, aff'd 328 F. 2d 40 (2nd Cir. 1964), so eminent a jurist as the Honorable Edward Weinfeld is heard to complain about this Court's opinion in the *Weyerhaeuser* case *supra:*

> "The Court did not there define just what conduct by a shipowner would preclude recovery, nor have subsequent cases distilled the essential elements necessary to bar such recovery."

Similarly, in *McNamara* v. *Weichsel Dampschifffahrts*, 293 F. 2d 900, 903 (2nd Cir. 1961), it is stated:

> "Pittston, having undertaken the stevedoring, was under a duty to perform it in a workmanlike manner. If it rendered substandard or improper service, Pittston would be under a duty to indemnify Weichsel for any liability imposed upon Weichsel as a result of such service. This obligation to indemnify may be nullified, however, if Weichsel's conduct was such as to preclude recovery. *The difficulty lies in determining what conduct is sufficient to defeat Weichsel's right of indemnity.*" (Italics added.)

Indeed, in the opinions in this very case, and subsequently in *Mortensen* v. *A/S Glittre, supra,* the Court of Appeals for the Second Circuit has reiterated its uncertainty as what type of conduct this Court meant to preclude indemnity. These requests for a legal yardstick and further clarification from the Court, entrusted with the determination of the majority of the maritime causes in this country, should not go ignored.

CONCLUSION

For the foregoing reasons, this petition for a writ of ceritorari should be granted.

September 3, 1965

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
On Petition

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 1086

Judg. #66,581

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant and 3rd Party Plaintiff,

—v.—

INTERNATIONAL TERMINAL OPERATING CO. INC.,

3rd Party Defendant.

The issues in the above entitled proceeding having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury on April 7, 8, 9, 10, 13, 14, 15, 16, 1964, and the jury having rendered a verdict in favor of the plaintiff in the sum of $145,000.00 against the defendant, and also in favor of the third party defendant against the defendant, and the Court having granted defendant 20 days to file all motions and a new trial, it is

ADJUDGED that the plaintiff, Anthony Albanese have judgment against the defendant, N. V. Neder. Amerik Stoomv. Maats, in the sum of $145,000.00, and it is further

Appendix A

ADJUDGED that the third party defendant, International Terminal Operating Co. Inc., have judgment against the defendant, N. V. Nederl. Amerik Stoomv. Maats, dismissing the third party complaint.

Dated: New York, N. Y.
April 17, 1964.

JAMES E. VALECHE
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964 Decided April 9, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District

* Sitting by designation.

of New York, Irving Ben Cooper, *Judge*, in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

Appendix B

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

On this state of the proof we should have no difficulty in upholding the verdict for the plaintiff had the charge properly placed the issues before the jury, for if the hatch bosses sometime between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find the defendant negligent even if it did not have actual knowledge of an unsafe condition in the hold, if the

jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927, and if the owner had no actual notice that hilos were in use in the holds it would have no duty to turn on the ventilating equipment if the request to do so had not in fact been made. If the owner had such a duty of supervision, the mere use of the hilos in the hold might require his turning on the ventilators, to prevent a dangerous accumulation, even though the hold had not yet become an unfit place to work.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue

of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the

[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske,* 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines,* 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.,* 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964
Revised opinion filed June 15, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges*, and BLUMENFELD, *District Judge.**

* Sitting by designation.

Appendix C

Revised Opinion

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner & Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M.S. Schiedyk, owned by N.V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* judgment was en-

tered on verdict in favor of plaintiff against N.V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N.V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however,

allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous; for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927. Contrast *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, 2 Cir. 1960, 302 F. 2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise

free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro,* 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the

Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske,* 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines,* 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the war-

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The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

HON. M. JOSEPH BLUMENFELD,
District Judge.

ANTHONY ALBANESE,
Plaintiff-Appellee,

—v.—

N.V. NEDERL. AMERIK STOOMV. MAATS.,
Defendant and
Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed on both the complaint and the claim over and that the action be and it hereby is remanded to said District Court for a new trial in accordance with the opinion of this Court with costs to defendant-appellant.

A. Daniel Fusaro
Clerk